

**Supreme Court U.S.
FILED**

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No.

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IN THE

Supreme Court of the United States

LONG CLOVE LLC.,

Petitioner,

-v-

TOWN OF WOODBURY,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A government violates the Fifth Amendment's taking clause if it requires a dedication of recreational land as a condition for the issuance of a land use permit without first making an individualized determination that such a dedication is related both in nature and extent to the impacts generated by the proposed use and finding that the extent of the dedication is "roughly proportional" to those found impacts. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

The Court has not ruled on whether a requirement to pay a monetary fee "in lieu of" the dedication of recreational land could also result in a wrongful taking of property in the same sense meant by *Dolan*. Accordingly, the questions presented are these:

1. Is a monetary fee imposed by law "in lieu of" requiring a dedication of recreation land, as a condition for the issuance of a land use development permit, "property" and, thus, protected by the takings clause?

2. If so, is the government's action in calculating the amount of the fee subject to heightened scrutiny under *Dolan* requiring the government, in the first instance, to justify the amount of the fee using a rough proportionality standard?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or non wholly owned subsidiaries.

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<i>Dudek v. Umatilla County</i> 187 Or. App. 504, 69 P.3d 751 (2003)	13-15
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*Northern Illinois Home Builders Association, Inc. v.
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U.S. Constitution, Fifth Amendment	1

* * * * *

Other:

Been, <i>Impact Fees and Housing Affordability</i> , Cityscape 139 (2005)	8 7
General Accounting Office, <i>Local Growth Issues- Federal Opportunities and Challenges</i> , Government Printing Office, 2000	6
Landis, et. al., <i>Pay to Play: Residential Development Fees in California Cities and Counties</i> , State of California Department of Housing and Community Development (2001)	6

Nelson, "Development Impact Fees: The Next Generation", in Exactions, Impact Fees and Dedications, Freilich and Bushek ed., American Bar Association Publications, 1995 5

Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v City of Tigard*, Note, 75 N.Y.U. L. Rev. 242 (2000)
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OPINIONS BELOW

The post trial Decision of the New York Supreme Court for Orange County dismissing the Petitioner's complaint was rendered on September 26, 2003. (Unreported, A4-a). The Order of the New York Appellate Division of the Supreme Court for the Second Judicial Department affirming the trial court's decision was entered in that Court on May 31, 2005 and is reported at 18 A.D.3d 826. (A2-a). The Order of the New York Court of Appeals dismissing the Petitioner's as of right appeal was entered in that court on September 13, 2005. (Unreported, A1-a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257. The order of the New York Court of Appeals dismissing the Petitioner's as of right appeal on a finding that no substantial constitutional question was extant is an affirmance by the highest court of New York of the Appellate Division's order. See *R.J. Reynolds Tobacco Company v. Durham County*, 479 U.S. 130, 138-139 (1986).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment to the Constitution provides in relevant part: " . . . nor